IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.329 OF 2006

M/s.Manilal & Sons .. Petitioners

Versus

Bombay Forgings Ltd. .. Respondents

Mr.V.A.Thorat, Senior Advocate with R.A.Thorat i/b. M/s.Bhaishanker Kanga & Girdharlal for petitioners
Mr.Virag Tulzapurkar, Senior Advocate with Mr.Ranjit Shetty i/b. P.D.S. Legal for respondents.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 13th March 2006.

ORAL JUDGEMENT:-

. Rule. Respondents waive service. By consent heard forthwith.

2. By this petition under Article 227 of

Constitution of India, petitioner- original plaintiff challenges the judgement and order passed by the appellate bench of Small Causes Court in Appeal No.243 of 2004 in Interim Notice No.138 of 2002 in T.E.R. Suit No.39/44 of 2002.

3. By this order delivered on 5th October 2005, the appellate bench has dismissed petitioner's appeal and confirmed the order dated 8th October 2004 passed by the trial Judge.

4. It is not in dispute that petitioner instituted above suit in the Court of Small Causes at Mumbai for a decree of possession in respect of an immovable property, more particularly described in para 1 of plaint in the above suit.

5. It is the case of petitioner that it is the lessor and by an agreement dated 16th February 1972, the property was leased on a

monthly lease rent of Rs.6250/- to be paid in advance without any deduction of whatsoever nature on or before 10th day of each and every month.

6. For the purpose of present petition, it is necessary to refer to the lease deed dated 4th April 1972, only insofar as it provides for renewal vide clause (5) and clause (4) wherein it is agreed that the lease would be determined for non payment of rent upon notice being given by the lessor to the lessee.

7. In the above suit instituted for possession of the immovable property, petitioner relying upon the correspondence, including the letters dated 9th August 2001, 23rd October 2001, 28th December 2001 and two letters dated 4th January 2002 and 5th March 2002, coupled with Indenture of Lease coming to an end by efflux of time, applied for an interim injunction in the

following terms:-

(a) That pending the hearing and final disposal of the suit, by a temporary order and injunction of this Hon'ble Court, the defendant by itself, its servants and/or agents be restrained from parting with possession and/or creating third party rights in respect of the suit premises or part thereof whatsoever nature, without the permission of the plaintiff and/or this Hon'ble Court.

(b) That pending the hearing and final disposal of the suit, by a temporary order and injunction of this Hon'ble Court, the defendant by itself, its servants, and/or agents be restrained from carrying out any construction work on the suit premises or any part thereof

without obtaining prior permission of the Mumbai Municipal Corporation as well as other concerned authorities namely on the plot of land bearing Survey No.293 Hissa No.6 admeasuring 380.42 sq.mtrs., S.o.294 Hissa No.2 admeasuring 6299.17 sq.mtrs., S.No.294, Hissa No.5(part) admeasuring 702.32 sq.mtrs., S.No.295 Hissa No.15 admeasuring 1011.68 sq.mtrs. and Survey No.295 Hissa No.16 admeasuring 479.92 sq.mtrs.

10. The injunction notice dated 6th July 2004 praying for injunction in the aforesaid terms was served upon respondents lessee.

11. Respondent by a reply affidavit contended that it is true that the lease was for a period of 30 years commencing from 16th February 1972. It is also not disputed by them that the lease

provided for termination. However, relying upon clause enabling renewal of lease and refusal of petitioner to do so, it is contended by respondent that a suit being Suit No.1930 of 2002 is filed in this Court on Original Side for declaration that there is a valid, subsisting and binding agreement for renewal of the lease and that the said agreement be specifically performed and the lease renewed for a further period of 30 years. It is contended that the agreement provides for assigning, alienating, transferring or otherwise dealing with the suit premises. In para 3.3 of the reply affidavit this is what is contended:-

> "3.3 Without prejudice to the foregoing, I say that the defendants are in possession of the suit premises. The plaintiffs have not produced any material on record to even remotely suggest that the defendants are in the course of

> parting with possession of the suit premises in any manner save and except their bare apprehensions in the said application which are based "purely on assumptions" with no cogent material to support them and are expressly denied by the defendants."

13. Thereafter, it is submitted that by putting up construction on the suit property, no prejudice would be caused to petitioner plaintiff, inasmuch as, if they succeed they will be entitled to have structures as well. That apart, it is contended that the respondents have not put up any new construction, which is not in accordance with Municipal Rules and Regulations.

14. It is contended that there were settlement talks for renewal of lease deed but the said talks have failed. In sum and substance, the case set up is that petitioner is

not entitled to terminate the lease and that respondents have done whatever is necessary under the agreement as well as in law to claim renewal thereof. In this view of the matter, no case is made out for any interim injunction, much less in the terms prayed by petitioner.

15. This application was placed before the Trial Judge and by the order dated 8th October 2004 he held that no prima facie case is made out by the petitioner. Balance of convenience is not in its favour and, therefore, interim injunction application cannot be granted. Finding of the learned Trial Judge is that unless the Small Causes Court holds that lease has been validly determined/ terminated, it is not possible to grant any temporary injunction, more so, when the petitioner has permitted respondents under the lease agreement to construct and/or to assign and/or to transfer the suit premises. The notice was, therefore, discharged.

16. Aggrieved by the above finding and order an appeal came to be preferred by petitioner and the appellate bench upon hearing parties and perusing written submissions upheld the order of trial judge. Aggrieved by the above judgement and order present petition under Article 227 of the Constitution of India has been instituted.

17. Mr.V.A.Thorat, learned Senior Counsel appearing for petitioner submits that the impugned orders are ex facie erroneous and perverse. He submits that the Courts below have failed to appreciate that once the suit is filed on the basis that respondents had no right, title and interest in the property and, therefore, cannot remain on the same, then, it was incumbent upon the courts below to have protected the petitioner. He submits that the injunction was claimed on the basis that petitioner is entitled to the property as the lease had expired. The

suit is filed claiming the suit premises/ property back from the lessee and such lessee who is in possession, after expiry of lease cannot be permitted to deal with the property. Rights and benefits under the lease agreement are not available to respondent once the lease has expired or in any event, after the same has been put an end to, by atleast institution of suit, if not prior thereto. In such circumstances, it was the duty of the Courts below to have granted interim injunction as prayed for. He has invited my attention to the affidavit in reply and the written statement placed on record, in which it is denied by respondent that it proposes to deal with the property. Therefore, if the respondent is not desirous of dealing with property or is not likely to part with possession thereof, then, relief of injunction as claimed does not prejudice it at all. This being the position, the Courts below instead of discussing the entire case on merits, should have granted limited

interim relief.

18. That apart, Mr.Thorat, makes a very serious grievance that respondent has misled the courts below. It is a company which is a sick company. Such company is liable to be dealt with under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). Such company cannot, in the absence of, proper directions and orders proceed to deal with its assets and properties. He invites my attention to the modified sanctioned rehabilitation scheme. The same, according to Mr.Thorat, has been placed before Board for Industrial & Financial Reconstruction (BIFR) and has been sanctioned. This fact was suppressed from the Courts below. The modified scheme would demonstrate that respondent has made all preparations to deal with and dispose of the property and once the scheme is implemented and property is so disposed of, then nothing remains in the suit and it would be

rendered infructuous. In any event, the petitioner would then have to implead all parties who have entered into any transaction with respondent. That would complicate the matter further. In the light of these submissions and relying upon decision of Supreme Court in the case of Shantiprasad Devi Vs. Shankar Mahto, reported in (2005) 5 S.C.C. 543, Mr.Thorat submits that the impugned order be set aside and the petition be allowed.

19. Mr.Tulzapurkar, learned Senior Counsel appearing for respondents submits that this is a petition under Article 227 of Constitution of India. It is not permissible for this Court to re-appraise and re-appreciate the materials and that too relied upon by the Courts below at prima facie stage, in exercise of its writ jurisdiction. Such a course, if adopted, would mean that this Court is sitting in appellate jurisdiction over pure findings of fact and it is

clearly impermissible in law. That apart, according to Mr.Tulzapurkar, the contentions of the learned Senior Counsel Mr.Thorat are without any substance and devoid of any merits. He has invited my attention to the averments in the suit which is filed by respondents against petitioners in this Court and also the clauses in the lease agreement. He submits that the findings of the Courts below are based upon the contents of the lease agreement and once the lease agreement provides for renewal, which option has been already exercised, then, petitioner is not entitled to an injunction as prayed.

20. Mr.Tulzapurkar, submits that the payment of lease rent has been made and that too in advance. He, then submits that option of renewal is exercised before the lease was to expire by efflux of time. He submits that the complaint that respondents changed user of the land and, therefore, proceedings were initiated by the

Collector is also of no consequence because the order of Tahsildar has been challenged by respondent in appeal and the same is reversed by the Collector. He, therefore, submits that respondent is entitled to retain the land and the lease deed virtually stands renewed. In any event, a suit in that behalf is pending. The lease deed not prohibiting construction but rather permitting the same and further alienation, then, there is no question of any suppression nor is any prima facie case made out, as rightly concluded by the Courts below. Mr.Tulzapurkar submits that the decision relied upon by Mr.Thorat would not apply to this case inasmuch as the said decision was rendered in peculiar facts and circumstances of that case and when the Supreme Court was of the clear view that renewal was not agreed by parties. On the other hand, according to Mr.Tulzapurkar, the present case is covered by another decision of the Supreme Court in the case of State of Uttar

Pradesh Vs. Lalji Tandon through Lrs. reported in (2004) 1 S.C.C. 1. He submits that in law, there is difference between extension of lease and renewal of lease. The Supreme Court has made the distinction very clear and has said that option of renewal cannot be defeated or stalled on the proposed right of re-entry of the lessor, when no steps were taken for exercising that right till the option for renewal was exercised by the lessee. He submits that the entire attempt is to stall and foreclose the renewal and, therefore, the suit as well as the present petition is not bonafide and the same deserves to be dismissed with costs.

21. With the assistance of Mr.Thorat and Mr.Tulzapurkar, I have perused the petition and the annexures thereto. In the light of the fact that there is suppression alleged by Mr.Thorat and he brought to my notice the modified rehabilitation scheme, I was of the view that

time should be given to respondents to place their version on record with regard to the same. Accordingly, an affidavit has been filed by the General Manager, Finance and Legal of respondents in which in paras 4, 5 and 6 the following is stated:-

> "(4)Pursuant to an order dated January 11, 1988 passed by the Board for Industrial and Financial Reconstruction in Case No.176 of 1987 (21/93), this respondent was declared a sick Industrial Company within the meaning of Section 2(o) of SICA.
>
> "(5)By its order dated May 8, 1995, the BIFR sanctioned a scheme of rehabilitation and appointed ICICI Bank Limited (formerly known as ICICI Limited) as its Operating Agency. On the further orders and directions by the BIFR, the

operating agency submitted the modified draft rehabilitation scheme which was sanctioned by the BIFR vide its order dated November 11, 2002. Under the modified rehabilitation scheme as sanctioned, the respondent was permitted to enter into agreements with builders for construction of residential/commercial buildings thereon after obtaining the necessary approval therefor and subject to the approval of the assets sale committee. Pursuant to the tenders, the bid of one Ivory Property Trust was accepted and approved by the assets sale committee and accordingly a memorandum of understanding dated 10th September 2004 and a supplemental memorandum of understanding dated 6th October 2005 have been executed between this respondent and the developer in respect of the leasehold property

admeasuring 6846.80 sq.mtrs. bearing C.T.S.Nos. 5438 (S.No.294/2 and 295/15) and C.T.S.No.5441 (S.No.294/5B part and more particularly described in the schedule therein.

"(6)The said supplemental memorandum of understanding refers to the following two suits and the Developer has expressly agreed to take assignment of the said property from the respondents inter alia with the knowledge of these two suits.

(i) The T.E & R. Suit No.39/44 of 2002 filed in the Small Causes Court, Bandra by the petitioners against this respondent, in respect of the said property;

(ii) The suit No.1930 of 2002 in the High Court of Judicature at Bombay filed

by this respondent against the petitioners, in respect of the said property;

Thus the respondent has already given notice to the Developer of the said two suits.

22. The rejoinder affidavit is, thereupon, filed by petitioner and Mr.Thorat has invited my attention to the statements in the same. In his submission, in the order passed by the trial court which is dated 8th October 2004, it is recorded in para 6 that respondents are not putting up any new construction in the suit premises and they will not put up any such construction. Further, on affidavit it is denied that respondents are parting with possession of the suit premises in any way. However, he has invited my attention and in my opinion, rightly

so, to the fact that when such statements are made on affidavits, at the same time, the respondents had moved the authorities and put up a scheme seeking their sanction.

23. I have also perused the MOU which is dated 10th September 2004. On 6th October 2005, there is a supplemental MOU which has been executed with the Developer. From a perusal of the affidavit filed on behalf of respondent in this Court on 3rd February 2006 and more particularly para 5 thereof, it is apparent that the company has approached BIFR and the modified rehabilitation scheme was sanctioned vide its order dated 11th November 2002. It is clear from this affidavit that the respondents proceed on the basis that once the scheme is sanctioned, they can enter into agreement with Builders for construction of residential/commercial building. In my view, when statements to the contrary are made before the trial court and lower appellate

court, it was incumbent upon the respondents to have disclosed the above facts and documents. It is in this light that I am unable to accept the contention of Mr.Tulzapurkar that respondents will not only inform the developer but all such persons who claim any interest in the property in question, that the suit filed by petitioner in the Court of Small Causes is pending so also a suit filed by respondents against petitioners in this Court and all agreements are subject to the final outcome of the aforesaid suits. In my view, for this reason alone it is necessary to restrain the respondents from parting with possession or alienating and encumbering the suit property. More so, when it is not even the respondents' case that third party rights or interests have already been creatted in respec of the suit property.

24. There is one more reason why the orders of the Courts below need to be interfered with.

In my view, the courts below have proceeded on the basis that petitioners have failed to make out a prima facie case. This fining is recorded by relying upon the correspondence prior to the suit and the clauses in the agreement. As rightly submitted by Mr.Thorat, appearing for petitioners that the agreement between parties has come to an end by efflux of time on 16th February 2002. There has been no renewal thereof as understood by parties. The option has been exercised purportedly by respondents but it is also contended that the lease agreement has been terminated by petitioners herein. In these circumstances, as to whether, the termination by petitioners of the said agreement, is legal and valid or whether respondents have exercised their right of renewal in accordance with the terms of agreement and the so called termination cannot be given effect to is something which the court will have to decide upon materials and evidence at the stage of trial. It is not as if the respondents

can proceed on the basis that the agreement stands renewed. The breaches that have been pointed out by petitioners and even otherwise in the light of termination notice, whether the suit for possession filed by petitioner would succeed or not is something which cannot be conclusively decided at this stage.

25. From the averments in the plaint, it appears that case of the petitioners is that they have terminated the lease agreement. They have not accepted the attempt to renew the same. On the other hand, they have pointed out that lease has expired on 16th February 2002. Thereafter, an attempt was made to opt for extension of lease which is bad in law and not binding upon them. It is the case of petitioner that respondents are not entitled to ask for renewal of the lease. The petitioner has every right to refuse the same. The draft of extension is also returned along with amount forwarded by cheque.

Petitioners called upon respondents to hand over vacant and peaceful possession of the suit premises and the suit is filed on the basis that respondents are wrongfully withholding the same. Respondents have relied upon a letter dated 23rd October 2001 and a statement therein that they will extend the lease period by 30 years from February 2002 at an increased lease rent.

26. They also relied upon a further letter dated 28th September 2001. Both letters are dealt with by petitioners and reliance is placed in that behalf on a letter dated 21st January 2002. In these circumstances, it is erroneous for the trial court to hold that unless it is decided that the lease is validly and legally terminated the petitioner is not entitled to claim temporary injunction. The further observation of trial court that petitioner themselves have permitted respondent to assign or transfer the suit premises and raise new

construction thereon, disentitles them from any interim injunction, is equally erroneous and not well founded. It is this finding which is affirmed by the lower appellate court. The lower appellate court has also relied upon the clauses in the lease deed and held that the question as to whether any breaches of the terms and conditions have been committed or not is also relevant and, it appears that rent has been paid in advance so also the grievance that the non agricultural user is not permissible, no longer survives. Further reliance is placed by lower appellate court upon a suit which is filed for specific performance in this Court by respondents. In these circumstances, in my view, the least that can be expected from the courts below is to maintain and preserve status quo at site. It is not necessary at the prima facie stage to record a finding on legality and validity of the termination notice or on the aspect of renewal of the lease.

27. Courts below should have appreciated that when one side seeks possession of property after it determines the lease and other side insists that the same stands renewed and there is nothing on record to indicate that fresh lease deed has been executed prior to 16th February 2002, then, interim injunction restraining respondent from creating third party rights was the least that needed to be done. Accordingly, the courts below should have granted the interim injunction as prayed for. The courts below have misdirected themselves in law and have gone to the extent of probing the merits of the case in details at prima facie stage itself, which is impermissible in law. When the petitioner has made out an arguable case and is admittedly the owner of the property and further having determined the lease unless and until the legality and validity of the said determination is gone into respondents cannot be permitted to deal with the property,

more so, when the respondent is also seeking specific performance of an agreement of renewal between parties by a separate suit. The plaint in that suit proceeds on the basis that petitioner herein has refused to renew the lease and specifically perform the contract/agreement. In such circumstances, the courts below should have protected and preserved the subject matter of the suit. The very object and purpose of grant of interlocutory orders has been overlooked by the Courts below. Their approach is vitiated by an obvious error apparent on the face of record. Therefore, even if the orders are interlocutory, the same being vitiated as above, this is a fit case for interference in my jurisdiction under Article 227 of the Constitution of India.

28. In the result, Rule is made absolute in terms of prayer clauses (b). Orders under challenge are set aside. There will be an

interim injunction restraining respondents, their servant, agents and any person claiming through them from parting with possession and/or creating third party interest in respect of suit premises or part thereof till the hearing and final disposal of small cause court suit No.T.E.R.Suit No.39/44 of 2002.

29. This order is passed as I am not at all impressed by the submissions of respondents that there is no suppression and that no prejudice will be caused to the petitioners, once the third parties would be informed of pendency of proceedings. In my view, to avoid further complication and multiplicity of proceedings, it is necessary to pass restraint order in the above terms. Rule is made absolute accordingly with no costs.

30. However, it is clarified that all observations in this order are prima facie and

shall not influence the trial court while deciding the suit. So also, they shall not influence the court from dealing with the respondents' prayer for specific performance of the agreement of renewal of lease. These observations shall also not influence the authorities under Sick Industrial Companies (Special Provisions) Act, 1985 while deciding any matter arising under the same.

(S.C.DHARMADHIKARI, J)